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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 RENITA K. KANE,

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner of the
13 Social Security Administration,

14 Defendant.
15

Case No. C10-1796RSL

ORDER REMANDING CASE FOR
FURTHER ADMINISTRATIVE
PROCEEDINGS

16 This matter comes before the Court on a Report and Recommendation (“R&R”) from
17 United States Magistrate Judge Brian A. Tsuchida, defendant’s objections to the R&R, and
18 plaintiff’s response to the objections. In the R&R, Magistrate Judge Tsuchida recommends that
19 the Court reverse and remand the Commissioner’s decision for consideration of new evidence.

20 The government contends that the Court should instead affirm the Commissioner’s
21 decision. In support of that argument, the government raises two issues. First, the government
22 contends that the R&R improperly shifted the burden of proof to the Commissioner. A review of
23 the R&R shows that it did not do so. As plaintiff acknowledges, she bears the burden of
24 showing that there is new and material evidence. 42 U.S.C. § 406(b); Mayes v. Massinari, 276
25 F.3d 453, 462 (9th Cir. 2001). Material evidence is that which “bear[s] directly and substantially
26 on the matter in dispute.” Bruton v. Massinari, 268 F.3d 824, 827 (9th Cir. 2001). Additionally,
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1 plaintiff must demonstrate that there is a “reasonable possibility” that the new evidence would
2 have changed the outcome of the administrative proceedings. Mayes, 276 F.3d at 462 (quoting
3 Booz v. Sec’y of Health & Human Servs., 734 F.2d 1378, 1380-81 (9th Cir. 1984)). In this case,
4 plaintiff has met her burden. The administrative decision that approved plaintiff’s later claim for
5 benefits included a disability onset date that was only five months after the ALJ denied
6 plaintiff’s earlier application. Given the proximity in time, the later decision is, in itself, new
7 evidence. Luna v. Astrue, 623 F.3d 1032, 1034-35 (9th Cir. 2010). The approval decision was
8 based on additional new evidence, including a February 2009 EEG and an opinion from treating
9 neurologist Nicholas Poolos. It is undisputed that the ALJ who denied plaintiff’s earlier claim
10 was not presented with the new evidence. While it is not clear from the current record whether
11 the new medical evidence relates back to the earlier alleged period of disability, there is at least a
12 “reasonable possibility” that it does given the proximity in time and the fact that the evidence
13 relates to the same allegedly disabling condition that existed throughout the relevant time period.
14 Moreover, while the ALJ in the unfavorable decision found that plaintiff’s substance abuse and
15 non-compliance with her treatment undermined her claimed disability, the favorable decision
16 found to the contrary. Because the Court cannot conclude based on the current record whether
17 the two administrative decisions are inconsistent or reconcilable, the appropriate course is to
18 remand this action for further administrative proceedings. Luna, 623 F.3d at 1035.

19 Second, the government contends that the R&R did not clarify whether the remand it
20 recommended would be pursuant to sentence four or sentence six of the statute. Indeed, the
21 R&R’s recommendation that “the Commissioner’s decision be *reversed* and remanded” could
22 suggest a sentence four remand. R&R at p. 1 (emphasis added). However, a sentence six
23 remand is appropriate in this case to allow the Commissioner to evaluate the new evidence. 42
24 U.S.C. § 406(b); Melkonyan v. Sullivan, 501 U.S. 89, 98 (1991).

25 Accordingly, the Court ADOPTS the R&R except for its recommendation to “reverse”
26 the Commissioner’s decision. The Court REMANDS this case to the Social Security
27 Administration to consider the new evidence. Because of the nature of the remand, the Clerk of

1 the Court is directed to close the case but not to issue a judgment.

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3 DATED this 7th day of July, 2011.

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7 Robert S. Lasnik
8 United States District Judge
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